

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re Case No. 96-59647-JRG
PAUL A. WERNER and Chapter 13
MARIA WERNER,
Debtor(s).
_____ /

ORDER DENYING MOTION TO SET ASIDE ORDER
GRANTING APPLICATION TO MODIFY CHAPTER 13 PLAN

I. INTRODUCTION

Movant, Educational Credit Management Corporation ("ECMC"), filed a motion to set aside an order granting debtors' application to modify their Chapter 13 Plan. For the reasons discussed below, ECMC's motion is denied.

II. BACKGROUND

Debtors Paul and Maria Werner executed a promissory note for a student loan with ECMC. Before the note was paid in full, the debtors filed for bankruptcy under Chapter 13. ECMC proceeded to file a proof of claim for \$11,064.09, which included the amount due on the note, \$9,116.53, plus an additional \$1,947.56 in collection

1 costs and unpaid fees.

2 On August 30, 1999, debtors served on ECMC an "Application to
3 Modify Chapter 13 Plan" ("Application") and a "Notice of
4 Application to Modify Chapter 13 Plan and of Opportunity to Request
5 Hearing" ("Notice"). The Application sought to modify the debtors'
6 Chapter 13 plan to make the \$1,947.56 in collection costs and
7 unpaid fees on the promissory note "a general unsecured claim and
8 discharged upon plan completion." The Notice, in turn, provided
9 ECMC with twenty days from the mailing of the Notice to either file
10 an objection to the proposed Chapter 13 plan modification or
11 request a hearing on the matter.

12 ECMC admits receiving the Application and Notice on September
13 8, 1999, twelve days before the noticed filing deadline.
14 (Declaration of Peggy Helms at 2:7-8.) Nevertheless, debtors did
15 not receive a response to the proposed plan modification by either
16 the noticed deadline or several days thereafter.

17 Finally, on October 1, 1999, debtors' counsel filed a
18 declaration requesting that the Court confirm the debtors' modified
19 Chapter 13 plan, which the Court did by order filed October 4,
20 1999. ECMC, in turn, filed the instant motion to set aside the
21 "Order Confirming Modified Chapter 13 Plan" ("Order").

22 **III. DISCUSSION**

23 ECMC submits two separate bases upon which to set aside the
24 Order. First, ECMC argues that the Order should be set aside
25 because the \$1,947.56 in collection costs and unpaid fees on the
26 debtors' student loan constituted a nondischargeable debt under §
27 523(a)(8) of the Bankruptcy Code. Second, ECMC argues that the
28

1 Order should be set aside under Federal Rule of Civil Procedure
2 60(b)(1)¹, made applicable to bankruptcy proceedings under Federal
3 Rule of Bankruptcy Procedure 9024². As explained below, ECMC may
4 only properly move to set aside the Order under this latter basis.

5 With regard to ECMC's first argument, the Ninth Circuit
6 recently held that a student loan creditor's "failure to object to
7 the [chapter 13] plan or to appeal the confirmation order
8 'constitutes a waiver of its right to collaterally attack the
9 confirmed plan postconfirmation on the basis that the plan contains
10 a provision contrary to the Code.'" In re Pardee, 193 F.3d 1083,
11 1985 (9th Cir. 1999), quoting In re Pardee, 218 B.R. 916, 922 (9th
12 Cir. BAP 1998). In particular, the court

13 f[ou]nd no reason to depart from the well-settled policy
14 that confirmation orders are final orders that are given
15 preclusive effect. Regardless of whether the plan should
16 have been confirmed with the discharge provision ... "the
17 Plan is res judicata as to all issues that could have or
18 should have been litigated at the confirmation hearing."

18 ¹ Federal Rule of Civil Procedure 60(b)(1) provides in relevant part:

19 On motion and upon such terms as are just, the court may relieve a party or a party's legal
20 representative from a final judgment, order, or proceeding for the following reasons: (1)
21 mistake, inadvertence, surprise, or excusable neglect.... The motion shall be made within a
reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment,
order, or proceeding was entered or taken.

22 ² Federal Rule of Bankruptcy Procedure 9024 provides:

23 Rule 60 F.R. Civ. P. applies in cases under the Code except that

24 (1) a motion to reopen a case under the Code or for the reconsideration of
an order allowing or disallowing a claim against the estate entered without a contest is
25 not subject to the one year limitation prescribed in Rule 60(b),

26 (2) a complaint to revoke a discharge in a chapter 7 liquidation case may
be filed only within the time allowed by § 727(e) of the Code, and

27 (3) a complaint to revoke an order confirming a plan may be filed only within
28 the time allowed by § 1144, § 1230, or § 1330.

1 Id. at 3.

2 Nevertheless, while ECMC may not move to set aside the Order
3 on grounds that the confirmed plan discharges a purportedly non-
4 dischargeable debt, ECMC may still proceed under its second basis
5 and move to seek relief from the Order under Federal Rule of Civil
6 Procedure 60(b)(1)³.

7 A Rule 60(b) motion can be used "to modify a confirmed plan
8 of reorganization...." 10 Collier on Bankruptcy, ¶ 9024.05 at
9 9024-6 [15th ed. 2000]; See also In re Norris, 228 B.R. 27, 31 (M.D.
10 Florida 1998)("Since the instant [Rule 60(b)] motion was brought
11 ... less than one year after the ... Order Amending Confirmed
12 Chapter 13 Plan, [the creditor] can clearly seek relief under Rule
13 60(b)(1).")

14 In general, "courts should and do give a liberal construction
15 to 60(b)." 7 Moores Federal Practice, ¶ 60.18[8] at 60-138 [2nd ed.
16 1996]. Nevertheless, "[r]elief [under Rule 60(b)] is denied from
17 error resulting from mere carelessness." 7 Moores Federal
18 Practice, ¶ 60.22[2] at 60-181.

19 In this case, ECMC argues that its Bankruptcy Department did
20 not forward the Notice to its Legal Department quickly enough to
21 permit the filing of a timely objection to confirmation. This
22 argument falls most closely within the "excusable neglect" branch
23 of Rule 60(b)(1).

24 As the Ninth Circuit explained in United States v. RG&B
25 Contractors, Inc., 21 F.3d 952, 956 (9th Cir. 1994), "[e]ven a

26 ³ ECMC's motion under Rule 60(b) is timely, as it was filed on October 28, 1999, less
27 than one month after the Order was filed.
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1 liberal interpretation of "excusable neglect" will not excuse every
2 error or omission in the conduct of litigation." See also Engleson
3 v. Burlington Northern Railroad, 972 F.2d 1038, 1043 (9th Cir.
4 1992)("Neither ignorance nor carelessness on the part of the
5 litigant or his attorney provide grounds for relief under Rule
6 60(b)(1)."(citations omitted)); Kyle v. Campbell Soup Co., 28 F.3d
7 928, 931 (9th Cir. 1994)(Lawyer's mistake in adding three days for
8 service by mail to time for motion timed from entry of judgment did
9 not constitute excusable neglect.)

10 Applying this authority to the matter at hand, ECMC does not
11 present a compelling justification for relief under Rule 60(b)(1).
12 In essence, ECMC's claim of "excusable neglect" is premised upon
13 certain organizational delays in the processing of its paperwork:

14 Due to the volume of claims objections and other
15 bankruptcy proceedings received by the Bankruptcy
16 Department, and because the Bankruptcy Department first
17 had to research the basis for debtor's application and
18 determine whether it should be referred to the Legal
19 Department, the Legal Department was unable to respond to
20 debtor's objection in a timely fashion.

21 (ECMC's Memorandum of Points & Authorities at 2:15-19).

22 Dealing efficiently and effectively with the consequences of
23 a borrower's bankruptcy is simply an unavoidable part of being a
24 commercial lender; those lenders that have the best systems in
25 place to process bankruptcy-related documents will have a
26 competitive advantage. As such, ECMC should not look to the
27 bankruptcy courts to relieve it from the consequences of its own
28 organizational deficiencies. As ECMC was told in the context of
another bankruptcy case, "if the 'student loan business is a large
business ... well, then, they are going to have to be a little bit

1 better organized.'" In re Bernal, 207 F.3d 595, 599 n.4 (9th Cir.
2 2000).

3 Consequently, ECMC has failed to set forth adequate grounds
4 for relief from judgment pursuant to Federal Rule of Civil
5 Procedure 60(b)(1).

6 **IV. CONCLUSION**

7 For the forgoing reasons, the Court denies ECMC's motion to
8 set aside the Order Confirming Modified Chapter 13 Plan.

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10 DATED: _____

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13 _____
14 JAMES R. GRUBE
15 UNITED STATES BANKRUPTCY JUDGE
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1 Case No. 96-59647-JRG

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4 UNITED STATES BANKRUPTCY COURT
5 FOR THE NORTHERN DISTRICT OF CALIFORNIA
6 CERTIFICATE OF SERVICE

7
8 I, the undersigned, a regularly appointed and qualified
9 Judicial Assistant in the office of the Bankruptcy Judges of the
10 United States Bankruptcy Court for the Northern District of
11 California, San Jose, California hereby certify:

12 That I, in the performance of my duties as such Judicial
13 Assistant, served a copy of the Court's: ORDER DENYING MOTION TO
14 SET ASIDE ORDER GRANTING APPLICATION TO MODIFY CHAPTER 13 PLAN

15 by placing it in the United States Mail, First Class, postage
16 prepaid, at San Jose, California on the date shown below, in a
17 sealed envelope addressed as listed below.

18 I declare under penalty of perjury under the laws of the
19 United States of America that the foregoing is true and correct.

20 Executed on _____ at San Jose, California.

21 _____
22 LISA OLSEN

23 Devin Derham-Burk
24 Chapter 13 Trustee
25 P.O. Box 50013
26 San Jose, CA 95150-0013

27 Miriam Hiser, Esq.
28 LAW OFFICES OF MIRIAM HISER
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